

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JUN 15 2004

JAMES R. LARSEN, CLERK
DEPUTY
RICHLAND, WASHINGTON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

IN RE RIVER PARK SQUARE
PROJECT BOND LITIGATION.

NO. CS-01-0127-EFS

ORDER GRANTING IN PART AND
DENYING IN PART THE CITY OF
SPOKANE'S MOTION FOR ORDER
CLARIFYING CONFIDENTIALITY OF
SETTLEMENT COMMUNICATIONS,
GRANTING IN PART AND DENYING
IN PART RHUBARB SKY LLC'S
MOTION TO INTERVENE ON ISSUE
OF SCOPE OF COURT'S MEDIATION
CONFIDENTIALITY ORDER, AND
DEFINING THE SCOPE OF
CONFIDENTIALITY ORDER

On May 27, 2004, the Court conducted a motion hearing in the above-captioned matter. J. David Blair-Loy appeared on behalf of Rhubarb Sky LLC ("Rhubarb Sky"), Laurel Siddoway appeared for the City of Spokane (the "City"), Ladd Leavens appeared for Citizens Realty Company, Lincoln Investment Company of Spokane, River Park Square, LLC, and RPS II, LLC (taken together, the "RPS Defendants"), and William Cronin appeared on behalf of Preston Gates & Ellis ("Preston Gates"). The parties were represented at the hearing as reflected in the Court's minutes, (Ct. Rec. 1886). At the hearing, the Court considered the City's Motion for Order Clarifying Confidentiality of Settlement Communications, (Ct. Rec. 1836), and Rhubarb Sky's Motion

1 to Intervene on Issue of Scope of Court's Mediation Confidentiality
2 Order, (Ct. Rec. 1848). Both motions were appropriately accompanied
3 by memoranda. After reviewing the file and hearing the arguments of
4 counsel, the Court orally granted Rhubarb Sky's Motion to Intervene,
5 (Ct. Rec. 1848), and sketched the limits of confidentiality as used in
6 its Local Rules and in various orders entered in this case by Judge
7 Suko. This Order memorializes and supplements the oral rulings of the
8 Court.

9 I. ISSUES

10 In its motion, the City asks the Court to clarify Judge Suko's
11 confidentiality order. The City was prompted to file the motion to
12 ensure the actions it took with respect to a public record request
13 were in compliance with Washington's Public Disclosure Act, R.C.W. §
14 42.17.250 *et seq.*

15 The City's motion seeks clarification on the following issues:

16 (1) Whether the Court's referral order in conjunction with
17 Local Rule 16.2 (c)(4), or Judge Suko's later
18 Confidentiality Order and/or settlement conference orders
19 protect the confidentiality of all settlement communications
among counsel and party representatives participating in the
mediation process, whether or not occurring during, or with
a view to, a particular settlement conference, and

20 (2) Whether the Court's referral order in conjunction with
21 Local Rule 16.2 (c)(4), or Judge Suko's later
22 Confidentiality Order and/or settlement conference orders
23 protect the confidentiality of all settlement communications
among party representatives, even representatives who are
not direct participants in the mediation process.

24 In response, Rhubarb Sky identifies several categories of
25 documents that it believes are not within the boundaries of the orders
26 entered as part of the federal court mediation process in this case,
(hereafter, "Confidentiality Orders"). In the weeks before the

1 settlement agreement with the Plaintiffs was formalized, the City
2 communicated with Bond counsel, the Financial Advisor, the
3 Underwriter, and other non-legal consultants. Rhubarb Sky wants the
4 "2004 bond documents" that the City refuses to produce. In addition,
5 it requests, and the City declines to release, communications from the
6 RPS Defendants to recently-elected City council member, Joe Shogan.
7 Rhubarb Sky argues that because Mr. Shogan was not a member of the
8 City's mediation team and was not a direct participant in the
9 litigation, these communications do not fall within the
10 Confidentiality Orders. Finally, Rhubarb Sky requests and the City
11 declines to release a "one-page" record of a telephone message dated
12 February 19, 2004, from Internal Revenue Service agent Derek Knight to
13 City Chief Financial Officer Gavin Cooley on the grounds that it
14 reflects mediation information. In summary there are three groups of
15 documents at issue: (1) 2004 bond documents, (2) Shogan
16 communications, and (3) IRS telephone message.

17 **II. HISTORY**

18 On June 19, 2002, the Court referred this case to mediation
19 pursuant to Local Rule 16.2(c)(4) which provides, in pertinent part:

20 Proceedings Confidential. All proceedings of the mediation
21 conference, including any statement made by a party,
22 attorney, or other participant, shall, in all respects, be
23 confidential and may be privileged and not reported,
24 recorded, placed in evidence, made known to the trial court
or jury, or construed for any purpose as an admission
against interest.

25 During the course of mediation, Judge Suko issued a number of
26 orders. In his October 4, 2002, Order, Judge Suko expanded the
materials to be treated as confidential to include:

1 all memos, documents, reports, compilations, statements of
2 position and related materials, whether in written, printed,
3 electronic or other format, prepared, generated or received
4 for purposes of mediation shall be and remain confidential
5 and not be disclosed, reproduced or otherwise summarized to
6 non-parties to this litigation.

7 On May 23, 2003, Judge Suko issued an Order that made clear the
8 confidentiality requirements outlined above were ongoing: "Counsel for
9 the parties and their clients are herewith required to keep
10 confidential the substance of ongoing negotiations which occur in this
11 proceeding prior to arrival at a tentative settlement." In his August
12 22, 2003, Order, Judge Suko denied the City's motion seeking relief
13 from the confidentiality order, holding that confidentiality is a
14 critical part of any successful mediation process, but cautioned that
15 "[t]hrowing a veil of secrecy over the entire controversy, including
16 matters of public record, . . . was not what the confidentiality
17 orders were intended to do."

18 In March 2004, the City received the records request from Rhubarb
19 Sky that it believes would violate the Confidentiality Orders. This
20 hearing followed.

21 **III. DISCUSSION**

22 It is undisputed that the Court has the authority to determine
23 the scope of its Confidentiality Orders and it is for the state courts
24 to enforce Washington's Public Disclosure Act.

25 In defining the breadth of the phrase, "for the purposes of
26 mediation," this Court must be careful not to throw, "a veil of
secrecy over the entire controversy, including matters of public
record," as Judge Suko aptly put it. To begin, anything prepared by a
party or counsel or experts retained by a party for a mediation

1 session and anything occurring during a mediation session are
2 undisputedly, "for the purposes of mediation" and therefore, within
3 the breadth of the Confidentiality Orders. Further, the term embraces
4 settlement discussions between or among attendees following a
5 mediation session that are an extension of matters prepared for and
6 discussed at that mediation session. However, not every document
7 produced or contacts made by a party following a mediation session,
8 regardless of how long thereafter, are "for the purposes of
9 mediation." This is particularly true when one of the parties is a
10 public entity subject to state public disclosure laws as is the City.

11 Of the three groups of documents at issue, the Court
12 unhesitatingly rules that communications between the City and other
13 government agencies are not within the term "for the purposes of
14 mediation" as used in the Confidentiality Orders. In particular, the
15 February 19, 2004, telephone message from the Internal Revenue Service
16 to the City does not fall within that phrase. As to the
17 communications between Ms. Cowles and Mr. Shogan before he was sworn
18 in, they are not "for the purposes of mediation" as used in the
19 Confidentiality Orders. Councilman Shogan was not a member of the
20 City Council nor a member of the mediation team when those
21 communications occurred. However, communications between them after
22 he took office do fall within both the letter and spirit of the phrase
23 and, therefore, are subject to the Confidentiality Order. It is
24 immaterial that the Councilman was not a member of the City's
25 mediation team; as a member of the City Council, he was an integral
26 part of settlement efforts. His views on settlement were undoubtedly

1 important to the other members of the City Council and to the team.

2 Third, the communications between the City and its various expert
3 advisors on the subject of issuing general obligations bonds to
4 replace the revenue bonds were not "for the purposes of mediation."
5 These laudable efforts to construct a creative, if partial,
6 resolution to the litigation can not be defined as "for the purposes
7 of mediation" without erecting a barrier of secrecy to all efforts
8 following an unsuccessful mediation. To rule otherwise would permit
9 parties to engage in a mediation session and thereafter pursue
10 different strategies for an extended period as confidential without
11 reconvening any other mediation session. That is not "for the
12 purposes of mediation." The Court does caution that no negative
13 inference regarding any party or counsel in this case should be drawn
14 from the expression of this concern.

15 The Court, as requested by the City, has clarified what is
16 embraced by the phrase "for the purposes of mediation" as used in the
17 federal Confidential Orders, recognizing that it is for the Washington
18 state courts to apply Washington's Public Disclosure Act to such
19 material that is not covered by the federal Confidentiality Orders in
20 such state court cases as may follow.¹ Accordingly,

21
22
23 ¹In response to Preston Gates' submission in which counsel
24 describes a series of phone calls and e-mails exchanged between
25 counsel and Judge Suko, the Court concludes clearly such
26 correspondence, as described, would be covered by the Confidentiality
Orders. However, the Court specifically observes that merely labeling

1 **IT IS HEREBY ORDERED:**

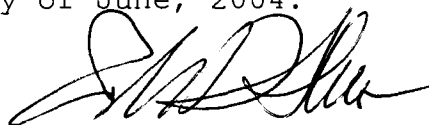
2 1. The City of Spokane's Motion for Order Clarifying
3 Confidentiality of Settlement Communications, (Ct. Rec. 1836), is
4 **GRANTED IN PART AND DENIED IN PART.**

5 2. Rhubarb Sky LLC's Motion to Intervene on Issue of Scope of
6 Court's Mediation Confidentiality Order, (Ct. Rec. 1848), is **GRANTED**
7 **IN PART AND DENIED IN PART.**

8 3. Specifically, the following materials are **NOT** within the
9 **scope of the Confidentiality Orders: (1) the 2004 bond documents,**
10 **(2) IRS telephone message, and (3) Shogan communications (prior to**
11 **taking office only). It is for the Washington state courts to apply**
12 **Washington's Public Disclosure Act to such material that is not**
13 **covered by the federal Confidentiality Orders.**

14 **IT IS SO ORDERED.** The District Court Executive is directed to
15 enter this Order and to furnish copies to counsel.

16 **DATED** this 15th day of June, 2004.

17 

18 _____
19 EDWARD F. SHEA
20 United States District Judge
21
22
23
24

25 materials with captions such as "CONFIDENTIAL FOR SETTLEMENT &
26 MEDIATION PURPOSES ONLY" is an insufficient means to shield documents
otherwise subject to disclosure.